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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

WILLIAM RHODE et al.,

Plaintiffs and Appellants,

v.

FLEETWOOD MOTOR HOMES OF
CALIFORNIA, INC., et al.,

Defendants and Respondents.

B204342

(Los Angeles County Super. Ct.
No. BC356403)

APPEAL from a judgment of the Superior Court of Los Angeles County, James R. Dunn, Judge. Affirmed.

Law Offices of Lawrence J. Hutchens, Lawrence J. Hutchens and Michael Humphries for Plaintiffs and Appellants.

Sutton & Murphy and Jeffrey L. LePere for Defendants and Respondents Fleetwood Motor Homes of California, Inc. and Niel's Motor Homes, Inc.

Sedgwick, Detert, Moran & Arnold, Elliott D. Olson, Douglas J. Collodel, Daniel W. Bir and Jeffrey H. Ikejiri for Defendant and Respondent Caterpillar, Inc.

In this action under the Song-Beverly Consumer Warranty Act (the Act), Civil Code section 1791 et seq.,¹ brought by purchasers of a motor home for breach of express and implied warranties, plaintiffs and appellants William Rhode and Lisa J. Rhode appeal from a judgment following the granting of summary judgment in favor of defendant and respondent Caterpillar, Inc. The Rhodes also appeal from the granting of judgment on the pleadings without leave to amend in favor of defendants and respondents Fleetwood Motor Homes of California, Inc. and Niel's Motor Homes, Inc. The Rhodes contend there are triable issues of fact as to whether an engine failure resulted in the motor home being unfit for its ordinary purpose and Caterpillar's failure to return the repaired motor home at Caterpillar's own expense within 30 days constituted a breach of the express warranty. Finding no triable issue of fact as to both issues, we affirm the judgment.

PROCEDURAL BACKGROUND

On September 7, 2006, the Rhodes filed a first amended complaint against Fleetwood, Caterpillar, and Niel's after the engine in their 2006 Fleetwood Expedition motor home malfunctioned. In the first cause of action against Caterpillar and Fleetwood, the Rhodes alleged the engine was defective. By failing to repair the engine within 30 days and after a reasonable number of attempts, Caterpillar breached express and implied warranties, and Fleetwood breached implied warranties. In the second and third causes of action against Niel's for rescission and restitution and revocation of acceptance, the Rhodes alleged they intended service of the summons of the first amended complaint to serve as notice of rescission and revocation of acceptance of the contract to purchase the motor home. Fleetwood and Caterpillar failed to repair the motor home after a reasonable

¹ All statutory references are to the Civil Code unless otherwise indicated.

number of attempts at repair. The Rhodes sought \$261,289.60 in damages in each cause of action.

Caterpillar moved for summary judgment on the ground there was no evidence that the Caterpillar engine currently installed in the motor home was defective. Caterpillar argued the Act did not apply, because the engine was not sold or repaired in California. In any event, the Rhodes were not entitled to relief under the Act for breach of express warranty or the implied warranty of merchantability because Caterpillar corrected the problem by replacing the engine the first time the Rhodes brought it in for repair, and there were no subsequent nonconformities. Moreover, the Rhodes suffered no cognizable damages for breach of the implied warranty.

On August 17, 2007, the trial court granted Caterpillar's motion for summary judgment. On October 4, 2007, the court entered judgment in favor of Caterpillar.

On September 21, 2007, Fleetwood and Niel's moved for judgment on the pleadings as to the first cause of action (Fleetwood) for breach of the implied warranty of merchantability and the second and third causes of action (Niel's) for rescission, restitution, and revocation. Fleetwood and Neil's argued that in granting Caterpillar's summary judgment motion, the trial court effectively ruled the motor home's engine-related issues do not support the claims of breach of the implied and express warranties.

On October 29, 2007, after taking judicial notice of the order granting summary judgment to Caterpillar, the trial court granted the motions by Fleetwood and Niel's for judgment on the pleadings without leave to amend.

This timely appeal followed.

FACTS²

On January 29, 2006, the Rhodes entered into a 240-month retail installment sale contract with Niel's in North Hills, California to purchase a new 2006 Fleetwood Expedition motor home for \$132,620. The total cost of the purchase, including financing, a service contract, and taxes, was \$261,289.50. The motor home was equipped with a Caterpillar C7 diesel truck engine, which had been shipped to Freightliner Custom Chassis Corporation in South Carolina for installation into the motor home.

Caterpillar issued a limited warranty applicable to the engine to be free from defects in material and workmanship for 60 months or 200,000 miles, whichever occurs first. The warranty provided: "Caterpillar Responsibilities[:]" [¶] If a defect in material or workmanship is found during the warranty period, Caterpillar will, during normal working hours and through a place of business of a Caterpillar dealer or other source approved by Caterpillar: [¶] provide (at Caterpillar's choice) new, Remanufactured or Caterpillar-approved repaired parts or assembled components needed to correct the defect. [¶] . . . [¶] For new engines powering . . . recreation vehicles, . . . provide reasonable or customary labor needed to correct the defect, including labor for removal and installation when necessary to make the repair. [¶] . . . [¶] During the first 12 months . . . provide reasonable or customary towing to the nearest authorized repair facility or reasonable travel expenses from the nearest authorized repair facility, if the vehicle is inoperable or continued operation would result in additional engine damage. [¶] User Responsibilities[:]" [¶] During the warranty period, the user is responsible for: [¶] . . . [¶] Travel or transporting costs, except as stated under 'Caterpillar Responsibilities.'"

² We state the facts in the light most favorable to the nonmoving party in accordance with the standard of review. (*Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 832 [review of summary judgment].)

On June 24, 2006, the first day of a planned trip to Las Vegas and Wisconsin, the check engine and low coolant warning lights came on. Despite adding coolant, the problem recurred. On June 28, 2006, en route from Yellowstone to Mount Rushmore, South Dakota, the lights came on again, white smoke emitted from the exhaust, the engine heated suddenly, and the temperature gauge moved rapidly. The Rhodes had the motor home towed to Butler Machinery, a Caterpillar service facility in Rapid City, South Dakota, where it arrived on June 29, 2006.

Butler Machinery found traces of coolant in the air dryer. Caterpillar authorized Butler to replace the engine instead of attempting any repairs in order to have the motor home fully operational as soon as possible. Caterpillar paid \$2,206 to rent a Suburban for the Rhodes, paid the Rhodes's hotel expenses, which amounted to \$1,047, and delivered and paid \$1,000 of the rental fee for a rental motor home when one became available for the Rhodes to use during the remainder of their trip. Caterpillar reimbursed approximately \$3,600 of the approximately \$4,600 that the Rhodes claimed in out-of-pocket expenses.

The engine replacement was completed and the motor home was fully operational by July 11, 2006. The engine experienced no problems thereafter. Caterpillar offered the Rhodes a one-way airplane ticket to South Dakota to pick up the motor home. The Rhodes rejected this offer. Fleetwood arranged for a contract driver to drive the motor home from Butler Machinery to Agoura Hills, California, where it arrived on October 10, 2006.³ The motor home displayed no problems during this journey.

³ The trial court sustained Caterpillar's evidentiary objection to the Rhodes's evidence that the Rhodes's attorney arranged and paid for the contract driver to return the motor home. This ruling is not challenged on appeal.

DISCUSSION

Summary Judgment in Favor of Caterpillar

The Rhodes contend the defective engine constituted a breach of the implied warranty of merchantability under the Act and Caterpillar's failure to return the vehicle to them at Caterpillar's expense within 30 days constituted a breach of the express warranty. We conclude summary judgment was properly granted.

A. Standard of Review

"Because this case comes before us after the trial court granted a motion for summary judgment, we take the facts from the record that was before the trial court when it ruled on that motion. . . . ""We review the trial court's decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained."" [Citation.] We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party." (*Yanowitz v. L'Oreal USA, Inc.* 36 Cal.4th 1028, 1037.)

B. The Act Applies

Preliminarily, Caterpillar argues that the Act does not apply in this case, because Caterpillar sold the engine to Freightliner Corporation in South Carolina, not to the Rhodes in California, and the Act applies only to goods sold in this state. (See, e.g., § 1793.2 [a manufacturer's express warranty duties under the Act apply to "consumer goods sold in this state"] and § 1792 [a manufacturer's implied warranty duties under the Act apply to "goods that are sold at retail in this state"].) Caterpillar's contention is without merit, because the "goods" in this case refers to the motor home, not the motor

home's component parts such as the engine, and it is undisputed that this motor home was sold in California. (See, e.g., *Cummins, Inc. v. Superior Court* (2005) 36 Cal.4th 478 (*Cummins*); see also § 1791, subd. (a) ["consumer goods" is defined as "any new product or part thereof that is used . . . primarily for personal, family, or household purposes"].) In *Cummins*, California residents who purchased a motor home in Idaho brought suit under the Act against the manufacturers of the motor home and the engine alleging, among other things, that the engine was defective and thus violated the express warranty. (*Id.* at pp. 483-484.) In ruling that the Act did not apply to consumer goods purchased outside of California, our Supreme Court made it clear that the relevant issue in determining coverage by the Act is the location where the sale of the motor home to the retail consumer occurred, because the statutory language indicated the Act was "intended to apply to the same universe of goods—those sold in this state." (*Id.* at p. 487.)

In this case, the motor home is the "goods" covered by the Act. Because the sale of the motor home occurred in California, the Act applies.

C. Implied Warranty of Merchantability

The Rhodes contend there is a triable issue of fact as to whether the engine failure resulted in the motor home being unfit for its ordinary purpose. They assert that the fact the engine was repaired and operational within two weeks is irrelevant. They contend the warranty was breached when the motor home failed to perform. As there is no triable issue of damages, and no other remedy was properly asserted in opposition to the motion for summary judgment, the cause of action for breach of the implied warranty must fail.

"In California, an implied warranty of merchantability arises under [the Act]: 'Unless disclaimed in the manner prescribed by this chapter, every sale of consumer goods that are sold at retail in this state shall be accompanied by the manufacturer's and the retail seller's implied warranty that the goods are merchantable.'" [(§ 1792.)] The "[i]mplied warranty of merchantability" or "implied warranty that goods are

merchantable” means that the consumer goods meet each of the following: [¶] (1) Pass without objection in the trade under the contract description. [¶] (2) Are fit for the ordinary purposes for which such goods are used. ...’ [(§ 1791.1, subd. (a).)] [¶] [The Act] provides a right of action for a buyer to recover damages and other relief when there has been a breach of the implied warranty of merchantability. [(§ 1794, subd. (a).)]” (*Isip v. Mercedes-Benz USA, LLC* [*Isip*] (2007) 155 Cal. App. 4th 19, 24-25 (*Isip*).)

In this case, it is undisputed that when the Rhodes advised Caterpillar the motor home was experiencing problems, Caterpillar told them to bring it to Butler for warranty repairs. The Rhodes had the motor home delivered to Butler. On July 3, 2006, Caterpillar authorized replacement instead of repair of the engine in order to have the motor home operational as soon as possible; and by July 11, 2006, the engine had been replaced and the motor home was fully operational. No further problems ensued.

The Rhodes attempted to raise the issue of rescission or revocation of acceptance of the purchase contract in opposition to the summary judgment motion. However, the trial court sustained evidentiary objections to all of the Rhodes’s evidence that they requested the motor home be “repurchased and/or replaced” on June 30, 2006 and July 5, 2006. These evidentiary rulings are not challenged on appeal. As a result, there is no evidence of rescission or revocation of acceptance by the Rhodes for purposes of appellate review.

The Rhodes argue the implied warranty was breached because the motor home was unusable in June 2006 when the motor malfunctioned. Caterpillar and Fleetwood argue that the warranty was not breached because, upon replacement of the engine, the motor home returned to being fully operational.

Without deciding whether a breach of the implied warranty of merchantability occurred, we conclude there is no triable issue of fact as to this cause of action because the undisputed facts demonstrate the Rhodes did not suffer damages.⁴

Section 1794 provides in pertinent part: “(a) Any buyer of consumer goods who is damaged by a failure to comply with any obligation under this chapter or under an implied or express warranty or service contract may bring an action for the recovery of damages and other legal and equitable relief. [¶] (b) The measure of the buyer’s damages in an action under this section shall include . . . [¶] (1) Where the buyer has rightfully rejected or justifiably revoked acceptance of the goods or has exercised any right to cancel the sale, sections 2711,[⁵] 2712, and 2713 of the Commercial Code shall apply. [¶] (2) Where the buyer has accepted the goods, sections 2714⁶ and 2715⁷ of the

⁴ Fleetwood argues the Rhodes suffered no damages because the repair was successful.

⁵ California Uniform Commercial Code section 2711 provides in pertinent part: “(1) Where . . . the buyer . . . justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (Section 2612), the buyer may cancel and whether or not he has done so may . . . recover[] so much of the price as has been paid[.]”

⁶ California Uniform Commercial Code section 2714 provides: “(1) Where the buyer has accepted goods and given notification (subdivision (3) of Section 2607) he or she may recover, as damages for any nonconformity of tender, the loss resulting in the ordinary course of events from the seller's breach as determined in any manner that is reasonable. [¶] (2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount. [¶] (3) In a proper case any incidental and consequential damages under Section 2715 also may be recovered.”

⁷ California Uniform Commercial Code section 2715, subdivision (1) provides in pertinent part: “Incidental damages resulting from the seller’s breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.”

Commercial Code shall apply, and the measure of damages shall include the cost of repairs necessary to make the goods conform.”

Since, as we have seen, there is no admissible evidence that the Rhodes revoked acceptance, they are not entitled to rescission damages under section 1774, subdivision (b)(1).⁸ As to damages under section 1794, subdivision (b)(2) (where buyer has accepted the goods), it is undisputed that the “repairs necessary to make the goods conform” were made. In its summary judgment motion, Caterpillar showed that the Rhodes suffered no damages, in that Caterpillar paid the full cost of replacing the engine and paid for substitute transportation and lodging for the Rhodes. Once Caterpillar established the absence of damages for breach of the implied warranty of merchantability, the burden shifted to the Rhodes to show through admissible evidence that they were entitled to any further damages under section 1794, subdivision (b)(2). (See *Morris v. De La Torre* (2005) 36 Cal.4th 260, 264-265 [“‘amendments to Code of Civil Procedure section 437c . . . place the initial burden on the defendant moving for summary judgment and shift it to the plaintiff upon a showing that the plaintiff cannot establish one or more elements of the action.’ [Citation.]”].) The Rhodes did not show “any other reasonable expense incident to the delay or other breach.” (Cal. Uniform Comm. Code, § 2715, subd. (1).)

⁸ We note, in the second and third causes of action of the first amended complaint, the Rhodes alleged that service of the summons was intended to serve as notice of rescission and revocation of acceptance of the purchase contract. However, neither in the trial court nor in this court did the Rhodes rely on this allegation. The second and third causes of action are against Niel’s only. The Rhodes did not state in their separate statement of facts that they revoked acceptance on September 7, 2006, the date they filed the summons of the First Amended Complaint. This allegation of the complaint was not cited by the Rhodes as evidence in support of a fact that they revoked acceptance. In any event, the September 7th purported revocation of acceptance, two months after repairs had rendered the motor home fully operational, did not “occur within a reasonable time after the buyer discovers or should have discovered the ground for [revocation of acceptance] and before any substantial change in condition of the goods which is not caused by their own defects.” (Cal. Uniform Comm. Code, § 2608 [revocation of acceptance not effective unless it occurs within a reasonable time after discovery of the defect].)

The Rhodes did not argue below or in their briefs before this court that the cost of transporting the motor home back to California is a recoverable incidental damage for breach of the implied warranty. In any event, the trial court sustained Caterpillar's objection to the evidence the Rhodes offered in support of the fact that their attorney, not Caterpillar, paid for the return of the motor home. There is no evidence in the record to establish that the Rhodes paid this transportation cost.

Under these circumstances, we need not decide whether the implied warranty of merchantability was breached, as summary judgment was properly granted in that there is no triable issue of damages.

D. Express Warranty

The Rhodes contend they are entitled to rescission damages because the repaired motor home was not returned to them at Caterpillar's expense within 30 days after it was taken out of service. We disagree.

Restitution or replacement is available to a buyer if the manufacturer does not repair a new motor vehicle to conform to an express warranty after a reasonable number of attempts. (§ 1793.2, subd. (d)(2) ["If the manufacturer . . . is unable to . . . repair [the chassis of a motor home] to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle . . . or promptly make restitution to the buyer[.]".]) The repair "so as to conform to the applicable warranties" must be accomplished within 30 days. (§ 1793.2, subd. (b).) "It shall be presumed that a reasonable number of attempts have been made [if] [¶] . . . [¶] [t]he vehicle is out of service by reason of repair of nonconformities by the manufacturer or its agents for a cumulative total of more than 30 calendar days[.]" (§ 1793.22, subd. (b).) Under section 1793.2, subdivision (c), "[t]he reasonable costs of transporting nonconforming goods after delivery to the service and repair facility until return of the goods to the buyer shall be at the manufacturer's expense[.]".

In this case, it is undisputed that the motor home was repaired in a single attempt that took less than two weeks. The Rhodes argue that the motor home was out of service “by reason of the repair” (§ 1793.22, subd. (b)) for four months because Caterpillar violated its duty to pay the reasonable costs of returning it to them (§ 1793.2, subd. (c)). However, the undisputed facts establish that once the repairs were completed, Caterpillar offered to pay for a one-way airplane ticket to South Dakota to enable the Rhodes to pick up their motor home. We hold, as a matter of law, that Caterpillar’s offer to provide air transportation to pick up the motor home satisfies the requirement to pay the reasonable transportation costs under section 1793.2, subdivision (c). There is no triable issue of fact regarding breach of the express warranty.

Judgment on the Pleadings in Favor of Fleetwood and Niel’s

The Rhodes contend that, as the trial court erred in granting judgment summary in favor of Caterpillar, the court’s “derivative order” granting judgment on the pleadings in favor of Fleetwood and Niel’s should be reversed. As we have concluded summary judgment was proper, we reject the Rhodes’s sole contention challenging the judgment on the pleadings.

DISPOSITION

The judgment is affirmed. Respondents are awarded costs on appeal.

KRIEGLER, J.

We concur:

ARMSTRONG, Acting P. J.

MOSK, J.